

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of THOMAS I. PACHECO and DEPARTMENT OF THE AIR FORCE,  
AIR FORCE SPACE COMMAND, F.E. WARREN AIR FORCE BASE, WY

*Docket No. 03-1459; Submitted on the Record;  
Issued November 12, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether appellant received an overpayment in the amount of \$1,191.78; and (2) whether appellant was entitled to a waiver of recovery of the overpayment.

The Office of Workers' Compensation Programs accepted appellant's claim for aggravation of asthma. By award of compensation dated October 11, 2000, the Office granted him a schedule award for a 47 percent permanent impairment of the lungs from July 31, 1998 to February 18, 2000, a period of 81.12 weeks. By letter dated October 10, 2001, appellant requested reconsideration of the Office's decision. By decision dated January 22, 2002, the Office determined that a miscalculation had been made regarding appellant's schedule award. The Office found that he should have received 78 weeks of schedule award compensation and, therefore, had overpaid him a total of 3.12 weeks. The Office indicated that the overpayment matter would be addressed in another decision. The Office, therefore, modified the Office's October 11, 2000 schedule award.

In a preliminary overpayment determination dated January 28, 2002, the Office found that appellant received an overpayment of \$1,191.78 because the Office incorrectly paid him a schedule award for 81.12 weeks, when it should have only paid 78 weeks of compensation. The Office found that appellant was without fault in the creation of the overpayment. The Office informed him that he could provide information regarding his income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of the Federal Employees' Compensation Act to recover the overpayment. The Office requested appellant to complete the enclosed overpayment recovery questionnaire, Form OWCP-20. Further, the Office informed him that, within 30 days of the preliminary determination, he could either request a telephone conference with the Office or request a prerecoupment hearing before an Office hearing representative.

By letter dated February 26, 2002, appellant requested a telephone conference with the Office and waiver of recovery of the overpayment. He submitted a copy of his tax return for the year 2000, an affidavit dated February 26, 2002 and the OWCP-20. In the affidavit, appellant

stated that, due to his shortness of breath, he had little income for the year 2000 and in 2001, he was briefly employed and returned to work at the employing establishment on December 17, 2001. He stated that he was currently working part time. The record contained a Form OWCP-20 dated February 12, 2002 which was received by the Office on January 14, 2003.

In a memorandum to the record dated January 14, 2003, the Office reiterated that appellant received an overpayment of \$1,191.78 for 3.12 weeks but stated that the OWCP-20 form that appellant referenced in his February 26, 2002 letter had not been received by the Office. The Office stated that it made several attempts to reach appellant's attorney and obtain a copy of the Form OWCP-20, but was unable to reach the attorney and she did not return the Office's calls. The Office stated that it discussed the matter of the Form OWCP-20 with appellant and he stated that he had sent the form several times but, the Office had not received the form. The Office noted that he had an adjusted gross income on his tax return of \$57,284.00, was only briefly employed in 2001 and had returned to working part time for the employing establishment on December 17, 2001. The Office stated that the telephone conference appellant requested would not be productive, without financial documents to review and discuss. The Office stated that his failure to provide the Form OWCP-20 prevented the Office from making an informed decision on the waiver. The Office stated that it would, therefore, request repayment from appellant.

By decision dated February 19, 2003, the Office finalized the preliminary overpayment determination, finding that appellant had received an overpayment of \$1,191.78 because the Office paid appellant for a schedule award of 81.12 weeks instead of 78 weeks and that appellant was without fault in the creation of the overpayment. In the accompanying memorandum to the decision, the Office stated that, on January 15, 2003, appellant's attorney called to schedule a telephone conference which was scheduled for February 12, 2003. The Office stated that, on February 12, 2003, the attorney cancelled the conference, indicating that she would reschedule and that did not occur. The Office stated that it would be glad to conference the case but, then despite appellant's assertions he had sent in the Form OWCP-20 on February 26 and October 2002, the Office did not receive it until January 2003.

The Office reviewed the Form OWCP-20 and considered that appellant's monthly income included social security benefits of \$1,011.00, part-time employment of \$2,390.40 and spouse's state retirement of \$1,979.23 or a total of \$5,380.63. The Office found that appellant's monthly expenses included rent/mortgage of \$100.00, food for two people of \$600.00, clothing for \$400.00, utilities of \$600.00 and other expenses of \$2,000.00 or a total of \$3,700.00. Further, the Office found that appellant had a liability of \$327.16 from the credit union so the total monthly expenses were \$4,027.16. The Office deducted the monthly expenses of \$4,027.16 from the monthly income of \$5,380.63 and found that appellant's income exceeded his expenses by \$1,353.47. The Office, therefore, found that because appellant's income exceed his expenses by \$50.00, appellant did not need all of his current income to meet current and ordinary and living expenses.

The Office also considered appellant's assets of land other than his primary home totaled \$70,000.00, his checking account balance was \$5,888.00 and his savings account balance was \$7,322.13. The Office found that appellant's assets exceeded the statutory minimum of \$5,000.00 for a claimant and his spouse. The Office, therefore, found that the recovery of the

overpayment would not defeat the purpose of the Act or be against equity and good conscience. The Office, therefore, denied waiver of recovery of the overpayment.

The Board finds that the Office properly determined that appellant was not entitled to a telephone conference.

On February 26, 2002 appellant requested a telephone conference. He alleged that he submitted the Form OWCP-20; however, the Office contended that it did not receive the form and appellant's attorney did not respond to several telephone inquiries made to obtain the form. The Office stated that, without the opportunity to review the requisite financial data, a telephone conference would not serve any useful purpose. The Form OWCP-20 of record indicates that it was received by the Office on January 14, 2003. Appellant's attorney subsequently arranged with the Office to have a telephone conference on February 12, 2003 but, thereafter, canceled the telephone conference, stating that she would reschedule it. The Board notes that the Office gave appellant sufficient notice and, since the telephone conference was not rescheduled, it was appropriate for the Office to proceed with a decision based on the financial information submitted. It was reasonable for the Office to issue the final decision on February 19, 2003 without having a telephone conference because appellant had the opportunity for such a conference, cancelled the conference and did not timely reschedule the conference. The Office proceeded to a decision based on the financial information submitted.

The Board finds that an overpayment in the amount of \$1,191.78 was created.

By decision dated October 11, 2000, the Office granted appellant a schedule award for a 47 percent permanent impairment of the lungs for 81.12 weeks. Subsequently, in a report dated December 5, 2001, the district medical adviser found that appellant's condition had worsened and he was entitled to a schedule award for 78 weeks. Further, the district medical adviser found that an erroneous calculation had been made and the last award should have been for 48.6 weeks. By decision dated January 22, 2002, the Office modified the October 11, 2000 decision, stating that appellant was entitled to an award for 78 weeks based on the district medical adviser's opinion and, since the Office had already paid appellant for 81.12 weeks, appellant had been overpaid for 3.12 weeks. In computing the amount of the overpayment, the Office multiplied appellant's weekly salary of \$509.31 by the statutory 2/3 percentage and multiplied that amount by 3.5 to obtain a total overpayment of \$1,191.78. The Office's finding that an overpayment was created in the amount of \$1,191.78 is proper.

The Board further finds that the Office properly denied waiver of the overpayment of compensation.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.<sup>1</sup> These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [by an overpayment] by the United States may not be made when incorrect payments has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of

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<sup>1</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

[the Act] or would be against equity and good conscience.”<sup>2</sup> Since the Office found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436<sup>3</sup> provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) [t]he beneficiary from whom the Office seeks recovery needs substantially all of his or her current income including compensation benefits to meet current ordinary and necessary living expenses; and (b) [t]he beneficiary’s assets do not exceed a specified amount as determined by the Office from data furnished by the *Bureau of Labor Statistics*. An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>4</sup> Further, an individual’s assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all the of the individual’s assets not exempt from recoupment.<sup>5</sup> Section 10.437<sup>6</sup> states that recovery of an overpayment is also considered to be against good conscience if the individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.

In this case, appellant’s monthly income of \$5,380.63 exceeded his monthly expenses of \$4,027.16 by \$1,353.47. Therefore, appellant’s excess income exceeded the statutory minimum of \$50.00 and appellant is not entitled to waiver in that regard. Further, appellant’s assets totaled \$70,000.00 and his checking and saving account balances totaled \$13,210.13 and that appellant’s assets exceeded the statutory minimum of \$5,000.00 for him and his spouse. The Office properly found that appellant did not meet the criteria for waiver of the overpayment and the finding is proper.

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<sup>2</sup> 5 U.S.C. § 8129(b).

<sup>3</sup> 20 C.F.R. § 10.436.

<sup>4</sup> *Frederick Arters*, 53 ECAB \_\_\_\_\_ (Docket No. 01-1237, issued February 27, 2002); *see Howard R. Nahikian*, 53 ECAB \_\_\_\_\_ (Docket No. 01-138, issued March 4, 2002).

<sup>5</sup> *Id.*

<sup>6</sup> 20 C.F.R. § 10.437.

The February 19, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
November 12, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member